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No. 80-1987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RED DIAMOND SUPPLY, INC.,
Petitioner,

versus

LIQUID CARBONIC CORPORATION (Settled) AND ACME WELDING AND SUPPLY, INC., AND AWISCO CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

RESPONSE TO PETITION

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STATEMENT OF THE CASE

Course Of Proceedings And Disposition In Courts Below

On May 31, 1974, plaintiff, Red Diamond Supply, Inc., filed a complaint against Liquid Carbonic Corporation ("Liquid"), Acme Welding Equipment and Supply Co., Inc., ("Acme"), Awisco Corporation ("Awisco"), and Unibraze Corporation under the Federal Antitrust Laws, Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2, the Louisiana Antitrust Laws, L.S.A.-R.S. 51:121, et seq., and 51:331, The Robinson Patman Act, 15 U.S.C. Sections 13a and f, Section 3 of the Clayton Act, 15 U.S.C. Section 14, the Louisiana Little FTC Act, L.S.A.-R.S. 51:1401, et seq. (Unfair Trade Practice and Consumer Protection Act), and the Economic Stabilization Act of 1970, 12 U.S.C. Section 1904 (R.1).[1]

On March 10, 1978, defendant Liquid moved for Summary Judgment (R. 931). On April 21, 1978, the Court issued its opinion (R.1155-1159 and R. 1232). The Court dismissed the Economical Stabilization Act Claim, the Robinson-Patman Act Claim, and the Louisiana Price Discrimination Claim (L.S.A.-R.S. 51:311). The Court denied the Motion as to the remaining antitrust issues, and the Louisiana Little FTC Act.

On May 9, 1978, Acme, Awisco and Unibraze moved for Summary Judgment (R. 1235). On June 2, 1978, the

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1 (R.1) is a reference to document 1 in the Trial Record in this case.

Court issued its Minute Entry granting the same relief it had granted Liquid, but denying Summary Judgment on Sections 1 and 2 of the Sherman Act and the State Antitrust Act and the Louisiana Little FTC Act.

On Saturday, June 3, defendants Acme, Awisco and Unibraze received notice that Liquid had settled with the plaintiff and although the settlement quantum was never revealed, it is estimated that it was for a cash payment in addition to which Liquid relinquished its counter-claim for money owed by Red Diamond. Acme, Awisco and Unibraze refused to settle.

Two days later, trial began on June 5, 1978 against Acme, Awisco and Unibraze without Liquid's presence at the trial. At the close of plaintiff's case, defendants moved for a directed verdict (T. 9/130, 131, 133-177).[2] Plaintiff opposed same (T. 9/178-196). Defendants stated a reply on the record (T. 9/197-204). The Court dismissed plaintiff's claim under the Louisiana Little FTC Act and the monopoly claim comprised of both Sherman II and its equivalent State claim of the plaintiff. This left only Sherman I and its equivalent State claim in the lawsuit. The Court subsequently dismissed Unibraze from the suit (T. 9/204-207).

At the close of the case, defendants Acme and Awisco again moved for a directed verdict (T. 13/44-50) and the

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2 The "T" designates transcript, which consisted of seven volumes identified by date. The "9" or first number is a reference to the June, 1978 date of the transcript day of trial. The other numbers are the page numbers in that volume of the transcript.

Court denied the Motion (T. 13/51). On June 14, 1978, the jury returned a verdict denying that there was any violation of the Federal Antitrust Act, Sherman I and inconsistently granting plaintiff a verdict under the Louisiana Antitrust Act. On June 15, 1978, judgment was entered in the case.

Plaintiff on June 19, 1978 moved to amend its complaint to conform to the evidence (R. 1442) and to treble the verdict of the jury (R. 1447). Defendants Acme and Awisco on June 23, 1978 filed Motions to reduce the jury award (R. 1450) and Judgment NOV and in the alternative for a new trial (R. 1462).

On June 5, 1978 the Court granted plaintiff's Motion to Amend and granted defendants' Motion for Judgment NOV and their alternative Motion for a New Trial (R. 1525). Plaintiff's appeal followed, which was based solely on State claims. Not a single issue of Federal Law was raised on appeal.

Oral argument was had in the Fifth Circuit Court of Appeal on September 29, 1980, and the Fifth Circuit affirmed the District Court on February 23, 1981, issuing a written opinion reported at 637 F.2d 1001.

Statement Of Facts

Petitioner bases this application for writs on the purported manufacturer's conspiracy raised only under Louisiana Law. At the District Court, there was no

attempt to establish a manufacturer's conspiracy. The case was tried as a distributor determination case where the distributor purportedly refused to adhere to territorial restrictions. Notice that the District Court's oral opinion and review of facts (B1-B9 in petitioner's brief) does not even touch upon the manufacturer's conspiracy.

The Fifth Circuit's opinion notes appellant's argument and dismisses it as to the manufacturer's conspiracy.

> "The record strongly suggests that there was significant interbrand competition in industrial gas products in the New Orleans area. It reveals, for example, that there was a total of seven manufacturers or suppliers of these products and a considerable number of their distributors serving the area." (637 F.2d at 1005)

John Pertuit detailed his personal knowledge of the some 25 distributors in the New Orleans area in his deposition taken February 23, 1978 (at page 43, line 23 through page 71, line 22). At trial he testified as to many of these same distributors (T. 6/129-136).

Again the Fifth Circuit discusses the products themselves:

> "The products themselves, moreover, were highly undifferentiated so that different brands were readily substitutable for each other in actual use. These facts are strongly indicative of a competitive market, and there is little in the record suggesting the contrary." (637 F.2d at 1005).

In plain fact, cylinder gas oxygen of one company is identical to cylinder gas oxygen of another company. Cylinder gas acetylene is identical to cylinder gas acetylene of another company. The industrial gases each are interchangeable with one another, a completely fungible product.

The Fifth Circuit opinion goes on to state:

> "Red Diamond, for example, did not produce market share data to support an inference that the market, despite the number of firms, was in fact concentrated. It did not even introduce Liquid's market share to suggest that Liquid's intrabrand restrictions might have had an effect on interbrand competition in the market. Indeed, as the district court found, Red Diamond failed to prove just what the relevant market was. The record indicates, moreover, that Liquid was not in fact the largest producer of industrial gas products in the New Orleans area." (637 F.2d at 1005-1006)

Clay Belle, President of Acme, testified to the severe competition in this service oriented business (T. 12/63-64, 67-68, 71, 73), and testified that it was repeat business composed of customers who returned to do business with a distributor (T. 12/72). John Pertuit, President of Red Diamond, also testified as to the competitive nature of the business and that he competed to help Liquid get accounts so that he could obtain the bottled gas (cylinder gas) business (T. 6/190, 192). Also, in the trial testimony, Mr. Pertuit used the phrase that he was "bucking the competition" (T. 6/219, Pertuit). Further in his testimony Mr. Pertuit noted that he has to compete with other distributors (T. 7/58, Pertuit). Even Mr. Brown, a Red Diamond Salesman, discussed competition. (T. 5/76, Brown).

There was also competition with the bulk accounts as evidenced by the American Marine account. First, Red Diamond lost its account to Acme as testified to by Mr. Pertuit (T. 6/42, Pertuit). Subsequently, Acme lost the whole account to Air Reduction Company, a loss termed a real heartbreaker by Mr. Belle (T. 12/76-80, Belle). The above are merely some of the many examples throughout the trial where competition, even severe competition, was delineated.

Petitioner's attempted attack of two footnotes, (7 & 8) in the Court of Appeals' Opinion together with the unsupported conclusions of a single disgruntled employee, Mr. Williams, does not make out a monopoly charge against seven manufacturers and some twenty-

five distributors. The attempt to establish a manufacturer's conspiracy between Liquid and its local distributors (Acme, Red Diamond and Industrial) and the six remaining manufacturers and suppliers and twenty-two remaining distributors by using Williams' meager conclusions is not well founded.

Finally, there was no testimony, nor anyone at trial competent to testify about Liquid's prices in Detroit, Michigan, as reflected by plaintiff's document 71U-71L noted at page 10 of petitioner's argument.

The volume for each of the five purchasers noted at page 10 of petitioner's brief is apparently year to date volume and does not reflect the total volume which appears on the very same documents for each of the purchasers. The total volume as appears on those documents for P. K. Supply is approximately four times the total volume as appears for Arrow. However, there is no deciphering what these numbers actually mean as no one testified as to these numbers.

The Court of Appeals in the second paragraph of Footnote 7 dismisses this argument on price variation.

> "Red Diamond also relied on documents showing a wide divergence in prices Liquid charged its distributors throughout the country for selling cylinder oxygen. While Red Diamond offered these data to prove a lack of

> competition among manufacturers, the documents on their face show that the price differentials are explainable simply in terms of differences in cumulative volume of cylinder oxygen sold. The other bits of evidence Red Diamond offered are simply unprobative of a conspiracy among manufacturers." (637 F.2d at 1006)

The unanimous conclusion of the district court judge and the three circuit court judges is that there was no manufacturers conspiracy. Petitioner has offered no evidence to support such a conspiracy.

As an alternative petitioner attacks the landmark decision of *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969). Petitioner's attempt to limit the evidence used in considering a motion for a judgment NOV to only a certain portion of the evidence rather than all of the evidence adduced at trial might be of benefit to petitioner but certainly is not a fair and just approach. Where petitioner has but a scintilla of evidence, petitioner would have the judgment NOV reviewed in terms only of its scintilla. There is little question that *Boeing v. Shipman* has been excellent law for twelve years in a multitude of decisions and is in no need of revision.

ARGUMENT

The transcript and record in this action are devoid of any facts or testimony which would support an inference of concerted action between all of the suppliers and distributors of industrial gas in the New Orleans area. The facts so strongly and clearly show the lack of existence of any agreement, combination, conspiracy or contract between these manufacturers that there is no evidence to support even an inference of such a combination or agreement.

Since the gravamen of the state law claim is combination or conspiracy, applicant's failure to support its allegations of concerted activity between the manufacturers and the distributors with "significant probative evidence" defeats any semblance of a claim applicant may believe it has under the applicable state law. *Scranton Construction Co. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 782 (5th Cir. 1974), *Cert. Denied* 419 U.S. 1105. The applicant cannot rely simply upon its conclusive allegations f "combination and conspiracy". *First National Bank of Arizona v. City Services Co.*, 391 U.S. 253, 289 (1968).

Finally, Red Diamond made no attempt nor any effort to prove any anticompetitive effect which would be necessary to establish a case for the jury under the rule of reason. Pertuit himself testified that he gave his customers to interbrand competitors upon the close of his termination. (T. 6/143, 146, and 164).

CONCLUSION

Applicant realizing that it did not even attempt to establish any anticompetitive effect is grasping at the last "per se" straw. This too is in vain as there was simply no attempt to establish a manufacturer's conspiracy at the trial of this matter, and as an afterthought issue, there is simply no evidence to support it. All of the evidence which was introduced clearly shows substantial competition in the New Orleans market place for these interchangeable products.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that three true and correct copies of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served on opposing counsel by depositing said three copies in the United States mail, postage prepaid, addressed to Hon. Patrick D. Breeden, Matthews and Breeden, 830 Union Street, New Orleans, LA 70112 and Hon. C. Ellis Henican, Jr., Henican, James & Cleveland, 4440 One Shell Square, New Orleans, LA 70139, this ____ day of June, 1981.

I FURTHER CERTIFY that all parties required to be served have been served.

PETER FRANK LIBERTO